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No. 86-1528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
Appellant,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court for the State of Colorado

REPLY TO MOTION TO DISMISS OR AFFIRM

REX E. LEE *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

DANIEL S. HOFFMAN
JEFFREY A. CHASE
RICHARD G. WILKINS
GEORGE G. VENTURA
HOLME ROBERTS & OWEN
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

Counsel for the Appellant
Harsh Investment Corp.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY TO MOTION TO DISMISS OR AFFIRM

Contrary to the principal submission of appellees (Motion to Dismiss 10-13), appellant has not presented this Court with a premature claim of hypothetical harm.[1] The adoption of the SPEHA mountain view ordinance "inflict[ed] an actual, concrete injury" upon appellant. *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 193 (1985). Appellant suffered an immediate loss in the value of its property, as evidenced by the unwillingness of a prospective buyer to purchase the property after the ordinance went into effect. Tr. 192. The Denver Municipal Code, moreover, makes it a penal offense for appellant to even *design* a structure in violation of the SPEHA ordinance. Code §§ 10-57, 10-65, 1-13; J.S. App. 35a, 45a. The questions presented here are plainly ripe for judicial resolution.

These questions, moreover, are substantial. Appellant does not present a mere facial challenge to the SPEHA ordinance, but rather alleges that the application of the ordinance to its property exceeds constitutional limits. See J.S. 10-11. Thus, a court must do more than inquire whether the SPEHA ordinance has " 'denie[d] [appellant the] economically viable use of [its] land.' " Motion to Dismiss 13 (quoting *Keystone Bituminous Coal Association v. DeBenedictus*, 107 S. Ct. 1232, 1247 (1987)). Rather, proper analysis requires a careful consideration of the factors set out in the Jurisdictional Statement (at 15-28). See *Hodel v. Irving*, 55 U.S.L.W. 4653, 4656 (May 18, 1987). Thus, contrary to the assertions in the Motion to Dismiss, this appeal presents a controversy brimming with serious constitutional questions. The Court should note probable jurisdiction and conduct that analysis.

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[1] The other major landowners impacted by the SPEHA ordinance, Landmark Land Company, Inc., and Southmoor Park Shopping, Inc., are parties to this appeal. Supreme Court Rule 10.4. They have, moreover, urged the Court to note probable jurisdiction and rule in favor of appellant. *See* May 19, 1987 Letter to the Supreme Court of the United States by counsel for Landmark Land Company and Southmoor Park Shopping.

1. This Court has emphasized that, because of the difficulty of the multi-factored Takings Clause analysis, Fifth and Fourteenth Amendment compensation claims are not ripe for judicial review absent "an actual, concrete injury." *Williamson County*, 473 U.S. at 193. In previous cases, as noted by appellees (Motion to Dismiss 10-13), this Court has declined review because the lower court records did not reflect how various land-use regulations applied "to the particular land[s] in question." *Id.*, 473 U.S. at 191.[2]

Appellees' ripeness arguments are premised entirely on the assumption that the only injury resulting from land-use restrictions is the possible disruption of ongoing development plans. Motion to Dismiss 10-13. But the impact of land-use regulations extends beyond the drafting board. Property is held for many reasons other than development, including resale to others at a profit. And the record here unequivocally establishes that, despite the absence of any immediate development plans for its property (Motion to Dismiss 11), appellant suffered at least a $9 million loss immediately upon enactment of the SPEHA ordinance.

Appellant's vice president (Tr. 169) testified at trial that, prior to the restrictions imposed by the mountain view ordinance, appellant's "property just in land value was worth fifteen to sixteen million dollars." Tr. 185. Following passage of the ordinance, the property became worth no more than its "income basis" value of $6 million. Tr. 184.[3] This loss, furthermore, is not merely a hypothetical entry in appellant's accounting records. Appellant, at the time the SPEHA ordinance was passed, had received an offer to purchase its property for $15 million. Tr. 192. With the ordinance in place, however,

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[2] *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

[3] The property's "income basis" value is determined by capitalizing its current income flow. Tr. 184.

appellant's buyer has no further interest (Tr. 192) and any sale will now bring no more than the "income basis" value. Tr. 184-185. This loss certainly fits well within any reasoned conception of "concrete injury." *Williamson County*, 473 U.S. at 198.[4]

Appellees nevertheless claim that, until appellant submits a plan to develop its property in violation of the SPEHA ordinance and is denied a variance to permit such development, review here is premature. Motion to Dismiss 13. This assertion flies in the face of the SPEHA ordinance itself.

The Denver Municipal Code provides that "no structure shall be designed" unless it conforms with applicable mountain view restrictions (Code § 10-57; J.S. App. 35a), and renders violation of that proscription a penal offense (Code §§ 10-65, 1-13; J.S. App. 45a). Thus, appellees' claim that appellant must "apply[ ] for a building permit" before "presenting this Court with a ripe, concrete controversy" (Motion to Dismiss 13) is ludicrous. Appellant cannot apply for a building permit—or seek a variance to actually build the structure for which it desires a permit—without violating the very ordinance it challenges here. *CF&I Steel Corp. v. Colorado Air Pollution Control Commission*, 610 P.2d 85

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[4] *Board of County Commissioners v. City of Thornton*, 629 P.2d 605, 609 (Colo. 1981) (en banc) ("It cannot be doubted that diminution of value of * * * property constitutes injury in fact"). Appellees suggest that appellant's valuation evidence was not "expert" and was "plainly self serving." Motion to Dismiss 3 n.1. That evidence, however, was given by appellant's vice president in charge of acquisition and disposition of investment properties, who was certainly in an excellent position to know the value of appellant's holdings. Tr. 169. Moreover, the estimates of value submitted by appellant were based on a careful consideration of interest rates, rental rates, expense rates and capitalization rates. Tr. 179. Furthermore, appellees did not dispute the economic impact of the SPEHA ordinance on appellant's property, and they should not be permitted to complain that "no independent testimony or valuation was offered at any time as to the value of [appellant's] property." Motion to Dismiss 3 n.1. Appellees had the opportunity at trial to counter appellant's evidence, but did not.

(Colo. 1980) (en banc); *Colorado State Board of Optometric Examiners v. Dixon*, 440 P.2d 287 (Colo. 1968) (en banc). The City of Denver cannot have it both ways. It has prohibited appellant, by the very terms of its mountain view ordinance, from planning any development in violation of the SPEHA ordinance. Code §§ 10-57, 10-65, 1-13. The City should not be permitted to evade review in this Court by arguing that, because appellant has followed that command, appellant's challenge to the ordinance is not "ripe."

Even if it were possible for appellant to apply for a building permit or obtain a variance without violating the SPEHA ordinance, appellant should not be required to do so before obtaining review in this Court. The entire history of the SPEHA ordinance shows that it was adopted solely to halt further intensive development of appelant's property. See J.S. 4-8. The ultimate outcome of any attempt by appellant to relax the restrictions of the SPEHA ordinance on its property is foreordained. See *Ogo Associates v. City of Torrance*, 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761, 763 (1974) ("here appellants can positively state that the City Council would not have granted them a variance. The evidence is overwhelming that the City Council rezoned the * * * area because appellants planned to build their project there; it is inconceivable the City Council would grant a variance for the very project whose prospective existence brought about the enactment of rezoning. * * * To require appellants to apply to the City Council for a variance on behalf of this project would be to require them to pump oil from a dry hole").[5]

Moreover, a variance from the SPEHA ordinance can be granted only upon a showing of "exceptional and ex-

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[5] *Cf. NLRB v. Industrial Union of Marine & Shipbuilding Workers of America*, 391 U.S. 418 (1968) (administrative remedies need not be exhausted where the exercise would be futile and a negative result clear); *City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24 (1934) (same); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928) (same).

traordinary circumstances." Code § 41-74. The authorized variances cited by appellees (Motion to Dismiss 13 n.10), which permitted several small balconies and a narrow slice of otherwise unregulated structures to intrude into a view plane, demonstrate that mountain view ordinances are given an exceedingly strict construction by the Denver Board of Plan Enforcement Review and Variation.[6] Those two variances, in fact, demonstrate that relief is given from view plane restrictions only where there is some doubt about the applicability of a mountain view ordinance to a given structure and any intrusion into the view plane is, in any event, *de minimis*.[7] Those circumstances—questionable coverage and insignificant deviation—would not be present should appellant make any proposal to depart significantly from the terms of the SPEHA ordinance.[8] Thus, it is quite

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[6] The Terracentre Association variance cited by appellees permitted small balconies located on the 13th and 14th floors of an office tower to intrude into a view plane. The Board of Plan Enforcement Review and Variation noted in granting the variance that, because of the manner in which the view plane was drawn, "it is difficult to determine if the Ordinance actually affects any part of the building." Findings, Terracentre Association (4/9/81) at par. 9. Moreover, the maximum possible encroachment by the balconies into the view plane was "8.23 feet." *Id.*

The second variance cited by appellees involved the United Bank of Denver Tower. There, over 95% of a proposed office tower to be constructed on land zoned B-5 was outside the scope of any mountain view restrictions. However, a small "notch" of the building, approximately 13 feet wide and 154 feet tall, intruded into the City Park-Natural History Museum view plane. Transcript of Hearing Before the Board of Plan Enforcement Review and Variation, Jan. 17, 1980, at 11. The Board of Plan Enforcement Review and Variation granted a variance to permit construction of the "notch," finding that "B-5 zoning land was not intended to be encumbered by the Mountain View Plane Ordinance" and construction of the "notch" would "not reduce the silhouette of the building in relation to the view of the mountains." Findings, United Bank of Denver and Gerald Hines (jointly) (1/17/80) at pars, 6, 7.

[7] *See* note 6, *supra*.

[8] Furthermore, the parties who designed the structures involved in the above variance proceedings avoided the proscription of Code § 10-57, which prohibits the designing of structures covered by

clear that, as a result of that ordinance, appellant has lost all practical right to develop its property above 42 feet in height.[9]

Finally, as will be shown below, the record in this case does not suffer from factual deficiencies that will make application of the Just Compensation Clause unnecessarily difficult. See *Williamson County*, 473 U.S. at 190-191. Appellant's evidence at trial fully explicated the impact of the SPEHA ordinance on its property. J.S. 8-10. There is simply no just basis for denying review on ripeness grounds.

2. Beyond ripeness concerns, appellees suggest that appellant "raises a federal question only if it meets a simple, but strict test: whether the Mountain View Ordinance deprives [appellant] of economically viable use of its land." Motion to Dismiss 16. Use of this single-factor test, however, is patently improper where the constitutionality of land-use regulations as applied to discrete property is at stake. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); J.S. 10-15.[10] And, despite appellees' assertion to the contrary, this case does not present a "simple" facial challenge.[11]

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mountain view restrictions, because those restrictions were not clearly applicable to the *de minimis* intrusions involved. Appellant cannot similarly escape Code § 10-57.

[9] This Court should not deny review here on "ripeness" grounds simply because, at some future date, the Denver Board of Plan Enforcement Review and Variation might give appellant the right to erect, for example, a 50-foot flagpole on its property.

[10] Indeed, the Colorado Supreme Court's erroneous use of a "total loss of value" test is one of the primary issues raised by this appeal. J.S. 11-15. Appellees' suggestion (Motion to Dismiss 9) that the Colorado Supreme Court did not apply such a test is disingenuous. The Motion to Dismiss cites, at page 9, the Colorado Supreme Court's conclusion that appellant does not meet the "test" for a taking, but omits any reference to the "test" actually applied by the court: "it must be shown that the 'ordinance precludes the use of [the] property for *any* reasonable purpose.'" J.S. App. 13a (emphasis in original).

[11] Appellees' claim that the "only challenge to the [SPEHA ordinance] is that it is facially invalid" (Motion to Dismiss 13) distorts

Accordingly, proper resolution of this appeal requires application of the multiple, *ad hoc* factors set out in *Penn Central* and most recently discussed in *Irving*, 55 U.S.L.W. at 4656.[12] Analysis of those factors, furthermore, shows that appellant has raised a substantial Takings Clause claim that merits plenary review.

A. In *Irving*, the Court concluded that the escheat provision of the Indian Land Consolidation Act of 1983 had a "substantial" economic impact upon the Indian owners of allotted lands, even though "the income generated by such parcels may be properly thought of as *de minimis*" and the owners "retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*." 55 U.S.L.W. at 4656. The Court reached that conclusion because the "right to pass on valuable property to one's heirs is itself a valuable right." *Id.* Similar reasoning underscores the dramatic economic impact of the SPEHA ordinance upon appellant.

Here, appellant has lost all right to develop its property above 42 feet because the City of Denver has condemned a scenic easement across its property. J.S. 9.

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and misconceives appellant's position throughout this litigation. Appellant has always challenged the constitutionality of the SPEHA ordinance *as applied* to its property. Paragraph 7 of appellant's complaint, for example, alleged that "*the impact of the Southmoor Ordinance on plaintiff's property* is so onerous as to constitute a taking of the plaintiff's property." Complaint for Injunctive and Declaratory Relief, Certiorari and Damages, No. 82CV6782, District Court, City and County Of Denver (emphasis added). Appellant's concrete evidence regarding the effect of the ordinance on its property value (J.S. 8-10) shows that it did much more than mount a facial challenge. *Cf. Keystone Bituminous Coal Association v. DeBenedictus*, 107 S. Ct. 1232 (1987) (petitioners did not allege or prove any specific injury caused by enforcement of mine subsidence act).

[12] Those factors include " 'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.' " *Irving*, 55 U.S.L.W. at 4656 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). *See also* J.S. 15-23.

Although appellant retains the ability to use the portion of its property not burdened by the easement, the parcel nevertheless has been devalued by at least 60%. J.S. 16 & n.22.[13] Moreover, there can be little doubt but that the easement taken by the city "is itself a valuable right." *Irving*, 55 U.S.L.W at 4656.[14] And as to the easement, the extent of the taking has been, not 60%, but 100%. *Cf. Irving*, 55 U.S.L.W. at 4657 ("a *total* abrogation of these rights cannot be upheld"). Thus, the economic impact of the SPEHA ordinance upon appellant is unquestionably substantial. See J.S. 16-17.[15]

B. Appellees state that there is nothing in the record regarding appellant's "investment-backed expectations" (Motion to Dismiss 17) and assert that SPEHA's attempts to rezone the property regulated by the mountain view ordinance "are utterly irrelevant to this proceeding" (*id.* at 5). However, as shown in the Jurisdictional Statement (at 17-20), there is substantial evidence in the record illuminating the SPEHA ordinance's frustration of appellant's investment-backed expectations.[16] Furthermore, SPEHA's inability to achieve its desired goals through normal zoning procedures is central to appellant's submission in this case.

The SPEHA ordinance completely upset appellant's legitimate zoning-backed expectations. Although appel-

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[13] Unlike the situation in *Penn Central*, 438 U.S. at 137, there is no "transferable development rights" program to mitigate this economic loss. J.S. 16-17.

[14] Indeed, scenic easements have demonstrable value. Cantrell, *Scenic Easements: Evaluation Considerations*, 49 Real Estate Appraiser and Analyst 61 (1983); Sutte, *Scenic Easements*, 34 Appraisal Journal 531 (1966).

[15] Citing *Andrus v. Allard*, 444 U.S. 51 (1979), appellees suggest that any "strand" taken by the City of Denver from appellant's "bundle" of property rights is "a slim reed." Motion to Dismiss 16 n. 14. The continuing vitality of *Andrus* in support of such a proposition, however, is doubtful. *See Irving*, 55 U.S.L.W. at 4657 (Scalia, Powell, and Rehnquist, C.J., concurring).

[16] The undisputed evidence developed before the trial court shows that the investment expectation from appellant's property has been reduced by $35,380,000. Tr. 180-182; J.S. 8-9.

lant's property rights are always subject to legitimate government regulation, appellant had the right under state zoning law to expect that, if "environmental concern[s] or a change of circumstances" warranted alteration of those rights, "the proper procedure [was] to amend the zoning resolution." *Western Paving Const. Co. v. Board of County Commissioners of Boulder County*, 506 P.2d 1230, 1232 (Colo. 1973) (en banc). *Cf. Kaiser Aetna*, 444 U.S. at 179 (government actions "can lead to the fruition of a number of expectancies embodied in the concept of 'property'"). SPEHA pushed for the adoption of a mountain view ordinance only when it became apparent that appellant's legitimate zoning-backed expectations could not be altered in the ordinary course. J.S. 4-8. The ordinance, furthermore, was the result of a political process in which appellant had no effective voice. J.S. 18-20.[17] Thus, the second of this Court's "ad hoc" factors—interference with reasonable investment-backed expectations—strongly suggests that a taking has occurred.

C. The nature of the governmental action involved here also supports the conclusion that the SPEHA ordinance constitutes a taking of appellant's property. J.S. 20-23. The SPEHA ordinance does not proscribe a property use that is dangerous to the safety, health, or welfare of others. *Cf. Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Nor does it apply over a broad cross section of society or secure "something of an 'average reciprocity of advantage.'" *Irving*, 55 U.S.L.W. at 4656 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 398 (1922)). *Cf. Gorieb v. Fox*, 274 U.S. 603 (1927); *Welch v. Swasey*, 214 U.S. 91 (1909). Accordingly, appellees'

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[17] Appellee's assertion that appellant had "full and complete access to the political process" (Motion to Dismiss 7) ignores the reality that, as found by the trial court, this was "one of those cases where these people [the landowners] don't have very many votes and the Southmoor Park East Homeowners Association has several hundred." J.S. App. 24a.

citation of *Goldblatt*, *Gorieb* and *Welch* (Motion to Dismiss 14) is beside the point; the City of Denver's action here moves well beyond the propositions for which those cases stand.

Denver has condemned a scenic easement across appellant's property and, while the benefits of that easement flow to the public, the city has placed all of the attendant costs upon appellant. This Court would certainly not permit, without compensation, similar governmental action involving a utility easement. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This case gives the Court a needed opportunity to clarify whether the costs of a scenic easement—which are considerably more significant than those involved in a utility easement—should be "borne by corporations" rather than "individual taxpayers." *Penn Central*, 438 U.S. at 152-153 (Rehnquist, J., dissenting).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

REX E. LEE *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

DANIEL S. HOFFMAN
JEFFREY A. CHASE
RICHARD G. WILKINS
GEORGE G. VENTURA
HOLME ROBERTS & OWEN
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

Counsel for the Appellant Harsh Investment Corp.

May 29, 1987

* Counsel of Record